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RESPONSE REQUESTED

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No. 08-5721

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IN THE SUPREME COURT OF THE UNITED STATES

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STEVEN SPEARS, PETITIONER

v.

UNITED STATES OF AMERICA

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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# BRIEF FOR THE UNITED STATES IN OPPOSITION

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GREGORY G. GARRE
Solicitor General
Counsel of Record

MATTHEW W. FRIEDRICH
Acting Assistant Attorney General

JEFFREY P. SINGDAHLSEN
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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## QUESTION PRESENTED

Whether a district court may substitute its own powder-to-crack quantity ratio for the 100:1 ratio in the advisory Guidelines and apply that ratio to determine the sentence without also applying the sentencing factors in 18 U.S.C. 3553(a) to the particular facts and circumstances in the case before it.

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1, at 1-8) is reported at 533 F.3d 715. The order of this Court vacating the court of appeals' earlier opinion and remanding the case for further consideration in light of Kimbrough v. United States, 128 S. Ct. 558 (2007), is reported at 128 S. Ct. 858. The court of appeals' earlier opinion (Pet. App. 2, at 1-26) is reported at 469 F.3d 1166.

## JURISDICTION

The judgment of the court of appeals was entered on June 23, 2008. The petition for a writ of certiorari was filed on August

12, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a jury trial in the United States District Court for the Northern District of Iowa, petitioner was convicted of conspiracy to distribute 50 grams or more of crack cocaine and 500 grams or more of powder cocaine, in violation of 21 U.S.C. 846. The district court sentenced petitioner to 240 months of imprisonment, to be followed by ten years of supervised release. The court of appeals sitting en banc affirmed petitioner's conviction, but reversed his sentence and remanded for resentencing. This Court granted a petition for a writ of certiorari, vacated the judgement, and remanded for further consideration in light of Kimbrough v. United States, 128 S. Ct. 558 (2007). On remand, the court of appeals sitting en banc again affirmed the conviction, reversed the sentence, and remanded for resentencing. Pet. App. 1, at 1-8.

1. On June 2, 2004, law enforcement officers responded to a report of drug trafficking in a hotel room in Sioux City, Iowa. The officers observed a large number of people entering and exiting the room. They also stopped and searched a number of vehicles whose occupants had been seen leaving the room and found crack cocaine in the vehicles. The officers obtained a warrant to search the hotel room. Inside, they found petitioner and two others.

Petitioner was carrying $805 in cash, and he later admitted that he had sold powder and crack cocaine. Pet App. 2, at 3; Gov't C.A. Br. 6.

2. A grand jury returned an indictment charging petitioner with conspiracy to distribute powder and crack cocaine, in violation of 21 U.S.C. 846. Indictment. At trial, the jury found petitioner guilty of the conspiracy and found that he had been responsible for 1792 grams of crack cocaine and 500 grams of powder cocaine. Jury Verdict Form; Pet. App. 2, at 4.

At sentencing, the district court determined that petitioner's total offense level was 38 and his criminal history category was IV, resulting in an advisory Guidelines range of 324 to 405 months of imprisonment. Pet. App. 2, at 4; Pet. App. 4, at 20-22.[1] Petitioner asked the court to vary downward, arguing that the 100:1 powder-to-crack quantity ratio in the Guidelines would result in a sentence that would be substantially greater than necessary to promote the objectives in 18 U.S.C. 3553(a). The court agreed and concluded that it should use a 20:1 ratio instead. Pet. App. 2, at 8-9; see Pet. App. 4, at 26-29, 32-33. The court did not give an independent explanation for why it adopted that particular ratio, but instead expressly relied on the rationale in United States v.

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[1] The court increased petitioner's criminal history by one point, taking it from category III to category IV, on the ground that his criminal history was "substantially underrepresented." Pet. App. 4, at 20-21.

Perry, 389 F. Supp. 278 (D.R.I. 2005). Pet. App. 2, at 4, 9; Pet. App. 4, at 32. In Perry, the court adopted the 20:1 ratio based on a "finding [that] it made 'the most sense' because it was the ratio recommended by the Sentencing Commission in the 2002 Report." Pet. App. 2, at 8 (citing and quoting Perry, 389 F. Supp. 2d at 307-308).

The district court then recalculated the Guidelines range using the 20:1 ratio, which resulted in an offense level of 34 and a general sentencing range of 210 to 262 months of imprisonment. Because petitioner had a prior felony drug conviction, however, he was subject to a mandatory-minimum sentence of 240 months of imprisonment under 21 U.S.C. 841(b)(1)(A), making the effective range 240 to 262 months. Pet. App. 2, at 9; Pet. App. 4, at 23, 33-34.

Having decided to apply a 20:1 ratio, the court declined to conduct a case-specific analysis of the particular facts and circumstances of petitioner's offense and background under Section 3553(a). The court concluded that it did not need to engage in that analysis because application of the 20:1 ratio had already taken the sentencing range down to the mandatory minimum. In the court's view, this rendered any further Section 3553(a) analysis "a moot question." Pet. App. 4, at 28; see also id. at 26-27. The court also stated that if the court of appeals reversed the sentence, "then at that time I reserve my right to take a look anew

at the 3553(a) other factors because I really haven't ruled on those now." Id. at 28-29. The court accordingly sentenced petitioner to the statutory, mandatory-minimum sentence of 240 months of imprisonment. Pet. App. 2, at 9; Pet. App. 4, at 34.

3. a. Petitioner appealed his conviction, and the government cross-appealed his sentence. Pet. App. 2, at 3. After deciding to hear the case en banc on its own motion, 10/18/06 Order, the court affirmed petitioner's conviction but reversed his sentence and remanded the case for resentencing, Pet. App. 2, at 3. With regard to petitioner's sentence, the court held that district courts are not authorized "to reject the 100:1 quantity ratio and use a different ratio in sentencing defendants for crack cocaine offenses." Id. at 11. The court reasoned that Congress has repeatedly "elected not to revise the 100:1 quantity disparity between powder cocaine and crack cocaine" and that judges were not free to substitute their own policy view for Congress's in this regard. Id. at 13.

In addition, in response to the dissent's argument that Section 3553(a) permits consideration of non-case-specific factors, as well as case-specific factors, the majority explained that, regardless, the district court failed to engage in the required consideration of case-specific factors: "the district court failed to perform a § 3553(a) analysis at all, stating, 'once I made the decision I was going to vary on the [Perry] crack ratio basis, I

didn't really look at the other [§ 3553(a) factors] because to me it was a moot question.' * * * Although the dissent believes district courts are not limited to considering case-specific circumstances under § 3553(a), under this circuit's precedent, a district court must, at a minimum, perform the § 3553(a) analysis." Pet. App. 2, at 11-12 (alterations in original); see also id. at 13.

b. Petitioner filed a petition for a writ of certiorari challenging the court of appeals' sentencing decision. While that petition was pending, this Court issued its decision in Kimbrough v. United States, 128 S. Ct. 558 (2007). There, the Court held that "it would not be an abuse of discretion for a district court to conclude when sentencing a particular defendant" that the disparity between the Guidelines' treatment of crack and powder cocaine offenses "yields a sentence 'greater than necessary' to achieve § 3553(a)'s purposes, even in a mine-run case." Id. at 575. In so holding, the Court rejected the government's argument that the Guidelines reflected a congressional policy determination that the district court's sentences for crack and powder offenses must comport with the 100:1 quantity ratio in 21 U.S.C. 841(b). See Kimbrough, 128 S. Ct. at 571-573. To the contrary, the Court concluded, Section 841(b) "mandates only maximum and minimum sentences"; it "says nothing about the appropriate sentences within these brackets." Id. The crack/powder disparity in the Guidelines

reflected the Commission's decision to model the Guidelines on Congress's mandatory minimum sentences. Id. at 575. The Court reaffirmed that, while Section 3553(a) "requires a court to give respectful consideration to the Guidelines," those Guidelines are advisory, not mandatory. Id. at 570. Therefore, courts may decide that a Guidelines sentence, even in a mine-run case, would be "'greater than necessary'" to achieve the sentencing purposes in Section 3553(a) for that defendant. Id. at 575. Following that decision, the Court granted petitioner's petition for a writ of certiorari, vacated the decision of the court of appeals, and remanded for further consideration in light of Kimbrough. Spears v. United States, 128 S. Ct. 858 (2008).

c. On remand, the en banc court of appeals affirmed petitioner's conviction, reversed his sentence, and remanded for resentencing. See Pet. App. 1, at 1-8.

i. The majority explained that the district court here had not conduct "a proper § 3553(a) analysis." Pet. App. 1, at 2.[2] In particular, the district court failed to conduct "'an individualized, case-specific evaluation of the facts or of the defendant,'" and instead simply "'varied by replacing the 100:1

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[2] Although petitioner suggests (Pet. 6) that the court of appeals divided 5-1-5, and that there was no majority opinion, Judge Murphy specifically stated that she "concur[red] in Judge Riley's opinion," rather than concurring in the judgment only, Pet. App. 1, at 4, thereby making Judge Riley's opinion a majority opinion. The dissent also refers to Judge Riley's opinion as "the majority." Id. at 6.

quantity ratio inherent in the advisory Guidelines range with a 20:1 quantity ratio.'" Id. at 1, at 2-3 (quoting Pet. App. 2, at 13); id. at 2 ("district court substituted its own ratio, and did not conduct any additional analysis under § 3553(a)"). While "a district court may determine the 100:1 quantity ratio results in a harsher sentence than necessary," it may not simply "categorically reject the 100:1 ratio and substitute its own" ratio in lieu of "considering the overall goals of sentencing under § 3553(a) and conducting an individualized assessment of a defendant's case." Id. at 3 (internal quotation marks and citation omitted).

ii. Judge Murphy filed a concurring opinion to explain the basis for her disagreement with the dissent. Pet. App. 1, at 3-4. In Judge Murphy's view, district courts should not adopt "their own policy ratio to be applied in every cocaine case." Id. at 4. She explained that "[t]he role of the sentencing judge is not the same as that of a legislative policymaker. The sentencing focus must be on the 'particular defendant' rather than on a whole category of cases." Ibid.

iii. Judge Colloton, joined by four other members of the court, filed a dissenting opinion. Pet. App. 1, at 4-8. He rejected the view that the district court had simply applied a substitute ratio and had failed to conduct the required full Section 3553(a) analysis to the particular facts and circumstances. Id. at 7. In his view, the record indicated instead that the

district court had fully evaluated the Section 3553(a) factors, but had simply declined to resolve outstanding questions that would not affect the sentence the court would impose. Ibid.

The dissent also concluded that it was appropriate for each district court to adopt its own ratio to help guide its application of Section 3553(a) across the range of crack-cocaine cases seen by that court. Pet. App. 1, at 4-7. The dissent did not regard this Court's decision in Kimbrough as barring such an approach. Id. at 4. Moreover, the dissent concluded, the use of a court-specific ratio would promote consistent, rational, and transparent sentencing by that court and would be consistent with the authority of district courts to give weight to their own policy views on sentencing issues. See id. at 4-7.

ARGUMENT

Petitioner contends (Pet. 7-18) that the court of appeals erred in holding that "a sentencing court may [not] categorically reject the sentencing guidelines for crack cocaine simply because that court views that guideline as too harsh," id. at 7, and that a sentencing court may not adopt its own "reasonable alternative to the 100-1 ratio as a means of determining what sentence would be sufficient but not greater than necessary," id. at 10. Petitioner's claims do not warrant this Court's review. The court of appeals did not reject the ability of district courts to disagree on pure policy grounds with the 100:1 ratio. It instead

held that a sentencing court may not stop there and rest its sentencing decision on this one factor; the sentencing court must conduct a full Section 3553(a) analysis that also considers the particular facts and circumstances of the specific case before it. And to the extent the court of appeals also held that district courts should not adopt a specific replacement ratio, that issue does not warrant review in this case. The petition is interlocutory; that was not a necessary basis for the decision; and the court of appeals' decision does not conflict with any other court of appeals on the question whether a district court can base its sentence solely on its own substitute ratio, without conducting a full Section3553(a) analysis.

1. The court of appeals reversed petitioner's sentence and remanded the case to the district court for resentencing. Pet. App. 1, at 2. Its decision is therefore interlocutory, a posture that "of itself alone furnishe[s] sufficient ground" for the denial of certiorari. Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916); accord Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R., 389 U.S. 327, 328 (1967); American Constr. Co. v. Jacksonville, Tampa and Key West Ry., 148 U.S. 372, 384 (1893); Virginia Military Inst. v. United States, 508 U.S. 946 (1993) (Scalia, J., concurring in the denial of certiorari).

While not an invariable rule, denying review of the court of appeals' interlocutory decision makes particular sense here. The decision was based in large measure on the district court's procedural error, namely its failure to conduct the full Section 3553(a) analysis. See Pet. App. 1, at 2-3. The district court, moreover, indicated its willingness to consider other potential bases for a downward variance if the case were to be remanded for resentencing. See, e.g., Pet. App. 1, at 28-29. At present, petitioner's resentencing has been stayed pending resolution of his certiorari petition. 8/15/08 Order. It is quite possible that petitioner will receive the same or a substantially similar sentence on remand, even if the court of appeals' decision stands, thus potentially mooting these issues as to petitioner. Even if the matter is not mooted by petitioner's resentencing, a subsequent appeal may help to narrow or clarify the issues presented, including the scope and meaning of the court of appeals' decision.

2. Petitioner contends that the court of appeals held that sentencing courts may not reject the Sentencing Guidelines for crack cocaine on pure policy grounds, but must instead rest any rejection of that ratio on case-specific facts or circumstances. E.g., Pet. 8-9. As a result, petitioner contends, the practical effect of the court of appeals' decision is to prevent a sentencing court from rejecting the 100:1 powder-to-crack ratio in a mine-run case, which is directly contrary to this Court's decision in

Kimbrough, supra. Ibid. Petitioner's contention is based on a misreading of the court of appeals' decision, and, because his argument for this Court's review rests on that misreading, those arguments lack merit.

a. Petitioner contends that the district court conducted a full and complete analysis of the factors in Section 3553(a). E.g., Pet. 10-11. The court of appeals, however, disagreed. In both its initial decision and its decision following remand, the court of appeals explained that the district court had not conducted the full Section 3553(a) analysis as required by governing precedent. The district court instead simply "substituted its own ratio, and did not conduct any additional analysis under § 3553(a)." Pet. App. 1, at 2; see also Pet. App. 2, at 11-12 ("Yet, in the present case, the district court failed to perform a § 3553(a) analysis at all. * * * [U]nder this circuit's precedent, a district must, at a minimum, perform the § 3553(a) analysis.").

Petitioner, like the dissent below (Pet. App. 1, at 7), disagrees with that reading of the record. See, e.g., Pet. 10-11. The majority's conclusion, however, is supported by the district court's own statements about what it did. The district court at sentencing did not provide an analysis of the 3553(a) factors in light of the facts and circumstances of the case. Instead, it adopted a substitute ratio and applied that ratio to yield a

particular sentence, the mandatory minimum under the statute. It did not further address whether that substitute ratio yielded a sentence that was sufficient, but not greater than necessary, to achieve the sentencing purposes in Section 3553(a) in light of the particular facts and circumstances of this case.[3] See, e.g., Pet. App. 1, at 2 (quoting the district court's statement that "I didn't really look at the other § 3553(a) factors because to me it was a moot question"); see also Pet. App. 4, at 28-29, 32-34. And the failure to apply Section 3553(a) to the facts and circumstances of the particular defendant's case is procedural error. See, e.g., Gall v. United States, 128 S. Ct. 586, 596-597 (2007); Pet. App. 1, at 2-3; see also Pet. App. 2, at 11-12 ("[T]he district court failed to perform a § 3553(a) analysis at all. * * * [U]nder this circuit's precedent, a district must, at a minimum, perform the § 3553(a) analysis."). In any event, a dispute over whether the district court conducted a case-specific analysis under Section 3553(a) does not warrant this Court's review. See S. Ct. R. 10.

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[3] Petitioner suggests (Pet. 11) that the fact that the district court granted an upward departure under the Guidelines because petitioner's criminal history category understated the severity of his criminal history, demonstrates that the court conducted the full, case-specific analysis required by Section 3553(a). Even if this were considered part of the Section 3553(a) analysis, rather than (as was the case) a departure determination under the Guidelines, it is but one aspect of the facts and circumstances of the case and the range of Section 3553(a) factors the court was required to consider.

b. Nor did the court of appeals hold that a district court's policy disagreement with the Guidelines could not form the basis for a variance in an ordinary or mine-run case. Petitioner focuses on the court of appeals' statement that "the district court may not categorically reject the ratio set forth by the Guidelines," Pet. App. 1, at 3, and construes that statement as forbidding a district court from basing a variance "solely on the policy shortcomings of a guideline," Pet. 9. The court of appeals did not, however, state that a policy disagreement with the Guidelines is not an adequate basis for a variance. Rather, as described above (pp. 7-8, 11-13), the court recognized that a policy disagreement with the Commission's judgement in the Guidelines may be the basis for a variance, but that such a policy disagreement does not eliminate the sentencing court's obligation to conduct a full Section 3553(a) analysis in light of the facts and circumstances of the particular case before it.

Petitioner's reading of the court of appeals' decision is inconsistent with a subsequent, express statement by the Eighth Circuit on the authority of courts to disagree with the crack-to-powder ratio in the Guidelines. In United States v. Davis, 538 F.3d 914 (8th Cir. 2008), the court reversed as plain error a district court's refusal to consider the powder-to-crack ratio as a basis for a variance. Significantly, the court expressly stated that Kimbrough held that "a sentencing court's disagreement with

that ratio, even in the mine-run case, could be a discretionary basis for lowering a defendant's sentence." Id. at 918. In light of that decision, the Court need not grant review to clarify whether a sentencing court in the Eighth Circuit may vary based on a policy disagreement with the Guidelines in a mine-run case. The Eighth Circuit has made clear that a district court may do so, as long as the sentencing court also conducts the required Section 3553(a) analysis to determine that the resulting sentence is sufficient, but not greater than necessary, under the facts and circumstances of that defendant's case.

The court of appeals' insistence on an individualized sentencing assessment, of which the crack/powder disparity may be a factor, is consistent with this Court's repeated emphasis in Kimbrough on the individualized nature of the sentencing decision. For example, this Court held in Kimbrough that a "[t]he judge may determine * * * that, in the particular case, a within-Guidelines sentence is 'greater than necessary'" and that "[i]n making that determination, the judge may consider the disparity between the Guidelines' treatment of crack and powder cocaine offenses." 128 S. Ct. at 564 (emphasis added); id. at 575 ("[I]t would not be an abuse of discretion for a district court to conclude when sentencing a particular defendant that the crack/powder disparity yields a sentence 'greater than necessary' * * * even in a mine-run case.") (emphasis added); ibid. (noting "court did not purport to

establish a ratio of its own," but instead "appropriately framed its final determination in line with § 3553(a)'s overarching instruction to 'impose a sentence sufficient, but not greater than necessary'"); id. at 576 (stating that "the District Court properly homed in on the particular circumstances of Kimbrough's case").[4]

A requirement of individualized sentencing similarly accords with the approach taken by other courts of appeals. See, e.g., United States v. Russell, 537 F.3d 6, 11 (1st Cir. 2008) (stating that, "consistent with Kimbrough," the court has "emphasize[d] the importance of individualized, case-by-case sentencing determinations, rather than reliance on generalized ratios" and that the crack/powder disparity "is properly considered as one of the factors woven into the tapestry as the district considers what sentence is 'sufficient, but not greater than necessary' in each individual case"), cert. denied, No. 08-6067, 2008 WL 4064927 (Oct. 14, 2008); United States v. Barsumyan, 517 F.3d 1154, 1159 (9th Cir. 2008) ("The touchstone of a policy-based argument against the Sentencing Guidelines * * * is not that a particular upward or

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[4] It is also consistent with this Court's general emphasis on the district court's role in, and importance of, making an individualized sentencing determination. See, e.g., Gall, 128 S. Ct. 596-598; Rita v. United States, 127 S. Ct. 2456, 2465, 2469 (2007); see also Koon v. United States, 518 U.S. 81, 113 (1996) ("It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.").

downward adjustment, measured in levels, is unreasonable in isolation, but rather that its operation in the case under consideration results in a sentence, measured in months and years, that is inappropriate in light of § 3553(a). We then review that final, holistic sentencing determination for reasonableness.").

c. For the same reasons, there is no merit to petitioner's claim (Pet. 15-18) that review is warranted because the "Eighth Circuit's holding that a district court may not 'categorically reject' a particular Sentencing Guideline based on a 'policy disagreement' conflicts with circuit courts around the country," id. at 15. As discussed above, the court of appeals did not hold that a variance could not be based on a general policy disagreement with the Guidelines, and the Eighth Circuit has subsequently expressly stated that a policy disagreement, even in a mine-run case, can be the basis for a variance. Thus, the purported conflict does not exist.[5]

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[5] Petitioner contends (Pet. 17-18) that in United States v. Gunter, 527 F.3d 282 (2008), the Third Circuit held, as petitioner argues the court of appeals did in this case, that a variance cannot be based solely on the district court's policy disagreement with the Guidelines' disparate treatment of crack and powder cocaine offenses. To the contrary, the court in Gunter appears to have held (like the court below) that a policy disagreement can be the basis for a variance, but that the presence of a policy disagreement does not eliminate the sentencing court's ultimate obligation to determine, based on the facts and circumstances of the particular case, the sentence that is sufficient, but not greater than necessary, to achieve the sentencing purposes in Section 3553(a). See id. at 285-286. Gunter went on to stress that, "even in the ordinary case, the district court may determine that the crack/powder ratio yields a sentence that is greater than

3. Petitioner also contends (Pet. 10-13) that the court of appeals erred in holding that a district court may not adopt its own powder-to-crack ratio to guide its sentencing decision. That issue does not warrant review in this case. The decision below relied on the district court's procedural error in failing to conduct a full, case-specific analysis under Section 3553(a), and that error provided a full and adequate basis for reversing petitioner's sentence. See also pp. 10-11, supra (because the decision is interlocutory, the claims may well be mooted upon resentencing).

A holding that a sentencing court may not adopt its own ratio would not conflict with a decision of this Court or decisions of other courts of appeals. As petitioner acknowledges (Pet. 11), the Court did not decide this question in Kimbrough, supra. To the contrary, as the dissent below notes, there are statements in

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necessary after giving proper consideration to the § 3553(a) factors and the circumstances of the particular case." Ibid. (emphasis added). And, as petitioner argues elsewhere (Pet. 8-9), the ability to vary in the "ordinary case" necessarily means that a district court can vary based solely on its policy disagreement with the crack/powder disparity. Although in United States v. Sevilla, 541 F.3d 226 (2008), the Third Circuit described Gunter as "mak[ing] clear that any determination at step three that the crack/powder cocaine disparity is 'too vast' must give reasons that relate to the particular defendant and not be a categorical rejection of that disparity," id. at 232 n.5, that statement is dictum, and, in any event, does not warrant review of the opinion in this case from the Eighth Circuit, especially in light of the Eighth Circuit's express recognition, in Davis, 538 F.3d at 918, that district courts may vary from the Guidelines based solely on a policy disagreement with the crack/powder ratio.

Kimbrough looking favorably on the fact that the district court "'did not purport to establish a ratio of its own,' and 'homed in on the particular circumstances of Kimbrough's case.'" Pet. App. 1, at 4 (quoting Kimbrough, 128 S. Ct. at 575). The Court was not, however, presented with the question and therefore did not decide whether "a district court is forbidden to consider an alternative crack/powder ratio as a means of determining what sentence is 'sufficient, but not greater than necessary' to comply with the purposes of § 3553(a)(2)." Ibid. And while petitioner provides reasons why the use of a substitute ratio might be "consistent with the type of sentencing process this Court has sought in Booker and its progeny," Pet. 11, none of those cases addressed the issue. Similarly, petitioner has not identified (and we are not aware of) any other court of appeals decision with which the opinion in this case conflicts on the question whether a district court may adopt an explicit substitute ratio and impose sentence based solely on that factor. For all these reasons, review of the issue in this case would be both premature and unnecessary.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

GREGORY G. GARRE
*Solicitor General*

MATTHEW W. FRIEDRICH
*Acting Assistant Attorney General*

JEFFREY P. SINGDAHLSEN
*Attorney*

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